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Hart-Rudman Commission Releases Phase III of its Report entitled *Roadmap for National Security: Imperative for Change*

MAJ Jim Robinette

The U.S. Commission on National Security/21st Century, chaired by former Senators Gary Hart and Warren B. Rudman, released on 31 January 2001 its third report on U.S. National Security. Entitled *Roadmap for National Security: Imperative for Change*, the report concludes that "without significant reforms, American power and influence cannot be sustained."¹ Significantly for Environmental Law Specialists (ELSS), many of the potential threats to the Nation, both domestic and foreign, entail environmental concerns, either directly, as a causal factor for conflict, or as a collateral effect of military operations to be managed. The Phase III report and its predecessors are available on the internet at [Error! Bookmark not defined.http://www.nssg.gov/phaseIII.pdf](http://www.nssg.gov/phaseIII.pdf). (MAJ Robinette/RNR)

Integrated Natural Resource Management Plans Aren't Just for the Shelf Anymore

Scott Farley²

As installations frantically race the clock to complete Integrated Natural Resource Management Plans (INRMPs) by the statutory deadline imposed by Congress, little attention has been given to the equally critical requirement for plan implementation. Many view INRMP completion as the finish line, at which point the plan can be deposited along with so many others on the shelf to collect dust. The purpose of this article is to explain that successful development of an INRMP is only the first step to compliance with the Sikes Act Improvement Act of 1997 (SAIA).³ It is clear that Congress intended installations to take concrete steps to implement INRMPs to "provide for the conservation and rehabilitation of natural resources on military installations."⁴ An installation's failure to implement an INRMP may be reviewed by

¹ See, Hart, Rudman, et al., Phase III Report of the U.S. Commission on National Security/21st Century, at iv, available at [Error! Bookmark not defined.http://www.nssg.gov/phaseIII.pdf](http://www.nssg.gov/phaseIII.pdf).

² Mr. Farley is an attorney with the Army Environmental Center's Office of Counsel.

³ The SAIA is codified in the US Code at 16 U.S.C. §§670a-670f.

⁴ See 16 U.S.C. §670(a)(1) & (a)(3)(directing the Secretary of Defense to carry out a program for conservation and rehabilitation of natural resources on military installations and describing the purposes of that program).

Federal district courts under the Administrative Procedure Act (APA)⁵ and result in judicial issuance of injunctive relief that could disrupt mission-related activities. While an installation has a duty to implement an INRMP, the decision on how to implement is largely a matter of agency discretion. While installations should not unnecessarily narrow that discretion by making overly burdensome and precise commitments to implement specific projects in the INRMP, they should be prepared to make annual funding requests to move towards achieving planning goals and objectives.

Prior to 1997, the Sikes Act did not impose an affirmative duty to plan and manage natural resources on military installations. The Sikes Act encouraged and authorized "cooperative" planning for and management of fish and wildlife resources but did not require it. The SAIA marked a sharp departure. The SAIA imposes an affirmative mandatory duty on the Secretary of each military department to both prepare and implement an INRMP for every military installation under his jurisdiction unless an installation had been excluded due to the lack of significant natural resources.⁶ Installations, therefore, must develop and commence implementation of INRMPs by the statutory deadline – 18 November 2001. Installations are scrambling to meet the plan completion deadline, hampered by the requirement that INRMPs be developed in cooperation with and reflect the "mutual agreement" of both the US Fish and Wildlife Service (USFWS) and the State fish and game agency.⁷

After completing development of its INRMP, an installation will immediately face the challenge of implementing the plan.⁸ Neither the statute nor its legislative history sheds light on the meaning of the term "implement." In other words there is no express yardstick against which successful INRMP implementation can be measured. But the SAIA, viewed in its entirety, clearly anticipates some level of concrete INRMP implementation. For example, INRMPs must be action-oriented, providing for: enhancement of fish and wildlife habitat, protection and restoration of wetlands, public access for outdoor recreation; and, enforcement of natural resource laws.⁹ The Secretary of the Army is required to employ sufficient numbers of trained natural resource professionals to perform tasks necessary to implement INRMPs.¹⁰ The Secretaries of Defense and Interior must report annually to Congress on the implementation of INRMPs, including expenditure levels associated with conservation activities conducted pursuant to approved plans.¹¹ And Congress has authorized \$3,000,000 annually for each fiscal year through 2003 to carry out functions assigned to DOI under INRMPs.

Failure to develop or implement an INRMP in accordance with the SAIA and other applicable statutes¹² may place at legal risk ground-disturbing activities that have the potential

⁵ The applicable provisions of the APA include 5 U.S.C. §§551(1), (13); 5 U.S.C. §704; & 5 U.S.C. §706.

⁶ 16 U.S.C. §670a(a)(1)(B).

⁷ 16 U.S.C. §680a(2).

⁸ See 16 U.S.C. §670a statutory note (emphasizing that there is a deadline for installations to "prepare and begin implementing [an INRMP] in accordance with Section 101(a) of [the SAIA]")

⁹ See 16 U.S.C. §670a(b) (required elements of an INRMP).

¹⁰ See 16 U.S.C. §670e-2.

¹¹ See 16 U.S.C. §§670a(f)(1)) & (2).

¹² For example, the INRMP can be set aside for an installations failure comply adequately with NEPA or Section 7 of the Endangered Species Act (ESA) in development of the plan. See e.g. Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992) (concluding that Forest Service Land and Resource Management Plan, while programmatic in nature, is an action reviewable for compliance with NEPA); Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994) (enjoining the Forest Service from implementing timber sales, cattle grazing, road construction and other ground-disturbing activities for Forest Service failure to conduct Section 7 consultation on the effects of implementing the plan on threatened salmon species).

to impact natural resources. The SAIA, like the National Environmental Policy Act (NEPA)¹³ and the National Historic Preservation Act (NHPA)¹⁴, contains no internal mechanism for citizen or regulatory enforcement. That does not mean, however, that the Army's failure to develop or implement an INRMP will be shielded from judicial review. The Administrative Procedure Act (APA)¹⁵ provides the path to citizen enforcement. Initially, the APA makes clear that individuals aggrieved by an agency's failure to act may seek judicial review.¹⁶ It further empowers Federal district courts to review final agency action (or inaction),¹⁷ and establishes the scope and standard of judicial review.¹⁸

An individual that is concerned with an installation's failure to develop or implement an INRMP may, therefore, use the APA as a means of obtaining judicial relief. The reviewing court can provide the following remedies. It can: (i) declare the installation's action or failure to act illegal; (ii) direct the installation to comply with the law (i.e. to prepare and implement an INRMP); and, (iii) if warranted, issue an injunction precluding or limiting certain ground-disturbing activities (e.g. training) until the legal deficiency is remedied.¹⁹

In summary, installations have an affirmative duty to both develop and implement INRMPs. While installations will be accorded discretion in determining how to develop and implement such plans, Federal district courts are empowered to review an installation's compliance with the SAIA and provide injunctive relief, if appropriate. To avoid unnecessary litigation risk, ELS's can take action. Initially, they should ensure that a thorough and deliberative administrative record supporting development of the INRMP has been maintained and preserved.²⁰ In addition, ELSs should review INRMPs to ensure that the installation has not made overly burdensome commitments to implement specific projects given the lack of certainty of out-year funding. By including precise lists of projects and schedules, installations may unwittingly narrow their discretion and increase their legal risks where resource limitations require deviation. The INRMP should include language explaining that such projects are not hard commitments, but are included as targets to allow for rational programming.²¹ The INRMP should include subject to availability of funding (SAF) funding language developed by ODEP noting that annual funding for implementation is not guaranteed, and commit to revisit planning goals and objectives where implementation does not occur as anticipated (i.e. adaptive management language). Finally, ELS's should review INRMP implementation on an annual basis to ensure that natural resource managers have

¹³ 42 U.S.C. §§ 4321, et seq.

¹⁴ 16 U.S.C. §§ 470, et seq.

¹⁵ 5 U.S.C. §§ xxxx, et seq.

¹⁶ See 5 U.S.C. §702 (identifying parties entitled to a right of review)

¹⁷ See 5 U.S.C. §§551(1), (13) (defining agency action to include an agency's failure to act); 5 U.S.C. §704 (defining agency actions that are subject to judicial review).

¹⁸ See 5 U.S.C. §706 (empowering Federal district courts to compel agency action unlawfully withheld and to set aside agency action where that was: (i) arbitrary and capricious; (ii) an abuse of the agency's discretion; or (iii) amounted to a failure to comply with a procedure required by law).

¹⁹ Id.

²⁰ The administrative record should include all relevant information documenting the decisional path of the installation, coordination with the USFWS and State fish and wildlife agency (including their "mutual agreement), and public involvement. It should also include other relevant legal compliance documentation (e.g. NEPA documents, Endangered Species Act, Section 7 consultation; National Historic Preservation Act, Section 106 consultation).

²¹ The following is suggested language: "Implementation of this Integrated Natural Resource Management Plan is subject to the availability of annual funding. The installation will make best efforts to request funding through appropriate channels. Where projects identified in the plan are not implemented due to lack of funding, or other compelling circumstances, the installation will review the plan's goals and objectives to determine whether adjustments are necessary."

identified project requirements and made best efforts to request necessary funding. (Scott Farley/AEC)

Migratory Bird Rule Does Not Fly with the Supreme Court

LTC Jacqueline Little

On 9 January 2001, the United States Supreme Court issued its opinion in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (hereinafter *SWANCC*).²² At issue was the scope of the Corps of Engineers' regulatory jurisdiction under § 404 of the Clean Water Act (CWA). Specifically, the Court was asked to decide whether the provisions of §404 could be "fairly extended" to "an abandoned sand and gravel pit" that, over time, had evolved into a habitat for migratory birds, and, if so, "whether Congress could exercise such authority consistent with the Commerce Clause."²³ The Court, in a 5-4 decision delivered by Chief Justice Rehnquist, in which Justices O'Connor, Scalia, Kennedy and Thomas joined, ruled that the Corps exceeded its statutory authority under the CWA when it issued and applied a rule defining its regulatory authority to include jurisdiction over non-navigable, isolated, intrastate waters that serve as habitat for migratory birds (commonly referred to as the "Migratory Bird Rule").²⁴

Section 404(a) of the CWA regulates the discharge of dredged or fill material into "navigable waters" by authorizing the Army Corps of Engineers to issue or deny permits for such discharges.²⁵ Under the CWA, "navigable waters" are defined as "waters of the United States."²⁶ Corps regulations, in turn, define the term "waters of the United States" to include intrastate waters "the use, degradation, or destruction of which could affect interstate or foreign commerce."²⁷ In 1986, the Corps, through issuance of its Migratory Bird Rule, "clarified" these regulations, asserting that its jurisdictional authority under the CWA extended to intrastate waters "which are or would be used as habitat by birds protected by Migratory Bird Treaties or . . . other migratory birds which cross state lines."²⁸

The *SWANCC* case involved an abandoned sand and gravel pit with excavation trenches that had developed into a series of permanent and seasonal ponds frequented, at various times, by numerous migratory bird species. When the Solid Waste Agency of Northern Cook County decided to purchase the site for conversion into a solid waste disposal facility, it contacted the Corps of Engineers to determine if it needed CWA § 404 permits to fill in some of the ponds. After initially determining that it had no jurisdiction, the Corps later concluded that the site, while not a wetland, was a "water of the United States", because the ponds located at the site were used as habitat by migratory birds.²⁹

²² No. 99-1178. 2001 U.S. LEXIS 640 (U.S. S.Ct. Jan. 9, 2001).

²³ *Id.* at *6-7.

²⁴ *Id.* at *14, *27.

²⁵ 33 U.S.C. § 1344(a).

²⁶ 33 U.S.C. § 1362 (7).

²⁷ 33 C.F.R. § 328.3(a)(3).

²⁸ Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). The U.S. Environmental Protection Agency adopted a similar rule in 1988. See 53 Fed. Reg. 20,764, 20,765 (Jun. 6, 1988).

²⁹ 2001 U.S. LEXIS 640, at * 7-10.

In reversing the Seventh Circuit's decision upholding the Corps' jurisdiction over intrastate waters based on the presence of migratory birds,³⁰ the Court did not address the issue of whether the Migratory Bird Rule is unconstitutional under the Commerce Clause.³¹ Rather, the Court decided the case on narrower statutory grounds.³² Specifically, the Court held that:

(1) The text of the CWA does not support extending the Corps' regulatory jurisdiction to ponds that are not adjacent to open water.³³ In so ruling, the Court emphasized that § 404 of the CWA grants the Corps regulatory authority over "navigable waters." Citing its earlier opinion in *United States v. Riverside Bayview Homes*,³⁴ the Court noted that although Congress may have evidenced an intent to allow Corps regulation of *some* waters that could not be characterized as navigable in the traditional sense, such as the adjacent wetlands at issue in *Riverside Bayview Homes*, the plain language of the CWA did not support a more expansive reading.³⁵ In distinguishing *Riverside Bayview Homes* from *SWANCC*, the Court noted, first, that "[i]t was the significant nexus between the wetlands and 'navigable' waters" that informed [its] reading of the CWA in *Riverside Bayview Homes*," and, second, that in *Riverside Bayview Homes*, the Court "did not 'express any opinion' on the 'question of the authority of the Corps to regulate . . . wetlands that are not adjacent to bodies of open water'."³⁶

(2) Congress' failure to pass legislation that would have overturned regulations broadening the Corps' § 404 jurisdiction to include non-navigable, isolated, intrastate waters "the degradation or destruction of which could affect interstate commerce" does not demonstrate Congress' acquiescence to such regulations or any subsequently issued rules (like the Migratory Bird Rule) intended to clarify or explain them.³⁷ In 1977, the Corps of Engineers promulgated a regulation that defined "waters of the United States" to include "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."³⁸ In *SWANCC*, the Corps of Engineers argued that Congress had "recognized and accepted" this broader definition when it failed, as part of the 1977 CWA Amendments, to enact a bill restricting the meaning of the term "navigable waters" to "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce."³⁹ The majority rejected this argument, pointing out that the Court

³⁰ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999).

³¹ 2001 U.S. LEXIS 640, at *7.

³² *Id.*

³³ *Id.* at *16.

³⁴ 474 U.S. 121 (1985).

³⁵ *Id.* at 15-16.

³⁶ *Id.* at 15-16.

³⁷ *Id.* at *20.

³⁸ 33 C.F.R. § 323.2(a)(5).

³⁹ 2001 U.S. LEXIS 640, at *17-18. The Corps also argued that when Congress extended the U.S. Environmental Protection Agency's jurisdiction under § 404(g)(1) to waters "other than traditional navigable waters" it broadened the concept for purposes of the CWA as a whole. *Id.* at 18. The Court

is extremely careful when it recognizes congressional acquiescence to administrative interpretations of a statute, and “[failed] legislative proposals are ‘a particularly dangerous ground on which to rest an interpretation of a prior statute’” since legislation can be proposed or rejected “for any number of reasons.”⁴⁰

(3) Even if the CWA were not clear, the Migratory Bird Rule is entitled to no deference under *Chevron v. National Resources Defense Counsel*⁴¹ since the rule raises significant constitutional questions, and Congress did not clearly state that it intended the Corps’ jurisdiction under the CWA to extend to intrastate waters that may be used as habitat by migratory birds.⁴² In discussing the issue of *Chevron* deference, the court also noted that the Migratory Bird Rule raised important federalism questions that, given the lack of anything “approaching a clear statement from Congress” should not be resolved in a manner that “would result in a significant impingement of the States’ traditional and primary power over land and water use.”⁴³

Although *SWANCC* involved dredge and fill permits under § 404 of the CWA, a 19 January 2001 EPA/Corps of Engineers memorandum explaining the meaning and effect of *SWANCC* confirms that the decision applies with equal force in the § 402 National Pollutant Discharge Elimination System (NPDES) arena. Like the regulations implementing CWA § 404, the § 402 regulations define “waters of the United States” to include intrastate waters “the use, degradation, or destruction of which could affect interstate or foreign commerce.”⁴⁴ Further, before *SWANCC*, EPA had accepted the Corps’ view that waters which support significant migratory bird use generally possess the requisite interstate commerce nexus to be considered under this definition.⁴⁵ Thus, to the extent that regulators or other stakeholders rely solely on the presence of migratory birds to establish federal CWA jurisdiction over non-navigable, isolated intrastate waterways, installations can now argue that the water body in question is not a “water of the United States” and therefore no permits (either NPDES or dredge and fill) are required for discharges into such water body. If *SWANCC* were interpreted as being limited to cases arising under § 404 of the CWA, this would lead to the rather odd result that permits are required for pollutant discharges into a designated waterway under § 402 of the CWA, but not dredge and fill discharges into the same waterway under § 404. Such an outcome would hardly comport with Congress’ stated purpose for enacting the CWA – i.e., “restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters.”⁴⁶

Despite EPA’s and the Corps’ concession on the issue of § 402 application, the 19 January memorandum makes clear that both agencies view *SWANCC* as a limited decision having minimal impact on their “broad” jurisdictional authority under the CWA. Citing numerous quotes from the Supreme Court’s decision in *Riverside Bayview Homes*, EPA and the Corps conclude that Congress intended to define the waters covered by the Act broadly, despite explicit language in *SWANCC* to the contrary. The EPA/Corps memorandum quotes the Court in *Riverside Bayview Homes* as follows:

rejected this argument, finding that Congress’ use of the term “other waters” in § 404 (g) was ambiguous, and, therefore, of no use in resolving the issue. *Id.* at 21.

⁴⁰ *Id.* at *19.

⁴¹ 467 U.S. 837 (1984).

⁴² 2001 U.S. LEXIS 640, at *26.

⁴³ *Id.* at *25-26.

⁴⁴ 40 C.F.R. § 122.2.

⁴⁵ See 53 Fed. Reg. at 20,765.

⁴⁶ 33 U.S.C. § 1251.

. . . Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a *comprehensive legislative attempt* 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' This objective incorporated a *broad, systemic view* of the goal of maintaining and improving water quality: as the House Report on the legislation put it, 'the word integrity . . . refers to a condition in which the natural structure and function of ecosystems is [are] maintained. . . .'" Protection of aquatic ecosystems, Congress recognized, demanded *broad federal authority* to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' . . . *In keeping with these views, Congress chose to define the waters covered by the Act broadly.*⁴⁷

The *regulation* of activities that cause water pollution *cannot rely on . . . artificial lines . . . but must focus on all waters* that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.⁴⁸

In view of the *breath of federal regulatory authority* contemplated by the Act itself . . . the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.⁴⁹

Lost on the Corps and EPA, however, is the SWANCC majority's clear statement that the Court's decision in *Riverside Bayview Homes* hinged on 1) the "significant nexus" between navigable waters and the wetlands at issue, and 2) an examination of Congress' intent solely with regard to the regulation of wetlands "inseparably bound up with the 'waters' of the United States."⁵⁰ Further, it appears that EPA and the Corps have turned a blind eye and deaf ear to SWANCC's counsel that "navigable waters", as used in the CWA, be read narrowly, since nothing in the Act's legislative history "signifies that Congress intended to exert anything more than its commerce power over navigation."⁵¹ Consequently, Army installations are likely to continue to encounter situations where there will be disagreement with EPA or the Corps as to whether "waters of the United States" are affected by installation activities. (LTC Little/CPL)

⁴⁷ 474 U.S. at 132-33 (emphasis added).

⁴⁸ *Id.* at 133-34, citing the Preamble to the Corps' 1977 regulations (emphasis added).

⁴⁹ 474 U.S. at 134 (emphasis added).

⁵⁰ 2001 U.S. LEXIS 640, at *15-16.

⁵¹ *Id.* at 816, n. 3. The Court also cites the Corps' original interpretation of its authority under § 404 of the CWA, as articulated in its 1974 regulations, emphasizing that the Corps itself defined "navigable waters" in terms of "the water body's capability of use by the public for purposes of transportation or commerce. . . ."

Coordination of Enforcement Actions with ELD

MAJ Elizabeth Arnold

Army Regulation (AR) 200-1, chapter 15 contains two important paragraphs for reporting and coordinating environmental enforcement actions with ELD. Environmental Law Specialists (ELs) at many installations do an excellent job of following the letter and the spirit of these provisions. However, some ELs have indicated uncertainty as to what sort of coordination is expected. The following discussion is intended to assist ELs in their duty to properly coordinate the enforcement actions that they are handling.

AR 200-1, paragraph 15-8 requires that environmental agreements “will be forwarded through command channels to ELD for review prior to signature.” As a practical matter, this means that the EL should coordinate with ELD’s Compliance Branch, generally by phone (703-696-1593), fax (703-696-2940), or e-mail ([Error! Bookmark not defined.Elizabeth.Arnold@hqda.army.mil](mailto:Elizabeth.Arnold@hqda.army.mil)), to forward a draft copy of the agreement prior to signature. For the most part, ELs do a good job of following this paragraph. Naturally, early coordination allows for a more detailed and meaningful review as compared with rushed coordination in contemplation of a short suspense.

The majority of coordination problems occur at the reporting stage for enforcement actions. Note that paragraph 15-7 is entitled “Reporting Potential Liability of Army Activities and People.”⁵² The word “potential” is significant here, as it should lead to erring on the side of contacting ELD whenever a regulator has indicated an intention to take any sort of enforcement action. Regarding instances of civil liability, the facts of a given case do not always lend themselves to bright-line determinations. Not all regulators specify a fine, for example. Some regulators specify a fine as the statutory maximum, without making a specific dollar amount. Other regulators engage in discussions during which the subject of a fine is mentioned but never put in writing. In all of these scenarios, ELs should at least contact ELD to determine whether more extensive coordination under paragraph 15-7 is needed.

The following guidance applies to identifying when federal, state, or local environmental regulators trigger the reporting requirement under paragraph 15-7. At the point when the regulator expresses a serious intent to assert itself *vis-à-vis* an alleged environmental violation, the EL should report up the chain per AR 200-1, paragraph 15-7(c). For those ELs who are unclear as to the sort of information that needs to be reported per paragraph 15-7, here are some suggestions: (1) name of the installation involved, as well as the state in which it is located; (2) name the statute(s) that the installation allegedly violated; (3) specify if the regulator is a federal, state or local entity; (4) provide a copy of the Notice of Violation to ELD, if it was in writing; (5) if there is no written Notice of Violation, but the regulator has communicated a dollar amount, share that information with ELD. Again, this information can be shared with ELD using the contact information given above.

Providing this information to ELD within 48 hours, per the time frame stated in the regulation, will enable ELD to start working with the EL to identify and work legal issues at an early stage. In some cases, ELD may know of a similar situation at another installation and can then assist the EL with the sharing of relevant information. In other words, early reporting and coordination can avoid the proverbial re-invention of the wheel.

⁵² Para. 15-7 requires reporting of “[a]ny actual or likely ENF not involving Civil Works that involves a fine, penalty, fee, tax, media attention, or has potential or off-post impact” (emphasis added).

After making a quick report within 48 hours, the regulation requires written reporting within seven days and a “report of significant development thereafter.” Examples of what constitutes a “significant development” would be: (1) discovery of evidence that either inculpatates or exculpates the installation; (2) assignment of an administrative law judge (ALJ) to the case; (3) a synopsis of any conference calls with the regulator or ALJ; (4) any offers or counter-offers for penalties of any kind; (5) any plans to assert affirmative defenses, particularly the defense of sovereign immunity.

Even ELSs who are experienced in environmental law practice can benefit from early and regular coordination of their cases. As new court decisions affect policy at the Headquarters level, ELSs can best ensure that their strategy is in line with current policy by following paragraphs 15-7 and 15-8 in a proactive fashion. Enforcement actions receive a high level of visibility at the Headquarters level, and regular reports on pending cases are shared with the Chief of Staff and the Secretary of the Army. Thus, early reporting of enforcement issues allows ELD to respond timely and accurately to inquiries that filter to Army leaders through technical channels. (MAJ Arnold/CPL)

Report to Congress on Environmental Penalties

MAJ Elizabeth Arnold.

In reporting the Defense Authorization Act for Fiscal Year 2001 (FY01),⁵³ the Joint Conferees included a requirement for the Secretary of Defense to prepare a report that “includes an analysis of all environmental compliance fines and penalties assessed and imposed at military facilities during fiscal years 1995 through 2001.”⁵⁴ The suspense for this report is no later than 1 March 2002.

According to this Congressional mandate, “[t]he analysis shall address the criteria or methodology used by enforcement authorities in initially assessing the amount of each fine and penalty. Any current or historical trends regarding the use of such criteria or methodology shall be identified.” At a minimum, all of the Services will have to pull data from their closed cases as far back as FY95, and going up to those cases that will have been closed by the end of FY01.

All of the Services will have to work together to gather data on their respective cases and give it to the Office of the Secretary of Defense (OSD) in a timely manner. Because the Army will have the majority of the data that will ultimately go into the Report, Army ELD has started to plan the format and timelines of the Report. Suggestions are welcome during this early stage of planning. OSD has already indicated that whatever data is reported will have to be at OSD NLT 30 November 2001. That will leave exactly two months after the close of FY01 to get all the Services to report their coordinated data to OSD.

This mandate presents the Services with an opportunity to put some important facts on the table. However, in order to do so, it will be necessary to compile data from cases that are long since closed. Some installations may be asked to do a scrub for data on old cases. Currently ELD is compiling as much data as possible based on the records available at the Headquarters level. Where deficiencies appear, individual installations will be contacted in an attempt to fill in the gaps for the needed data. Meanwhile, those installations with old closed cases are encouraged to refrain from purging any such files.

⁵³ 106 HR 5408.

⁵⁴ Senate Report 106-292 (May 12, 2000) of the Senate Armed Services Committee, to accompany the National Defense Authorization Act for Fiscal Year 2001 (Senate Bill 2549).

Currently ELD is working closely with OSD to draft the format of the report. The final product will probably resemble the Environmental Quality Annual Report to Congress, but with a bit more detail than what is annually reported. OSD plans to send out a data call on September of 2001. Between now and September, the individual Services will have to plan internally so as to make the ultimate suspense to OSD of 30 November 2001. (MAJ Arnold/CPL)

The Butterfly Effect: New Coastal Zone Management Act Regulations and Army Operations

MAJ Gerald P. Kohns (Chief, 10th Legal Support Organization (USAR) Environmental Law Team)

An oft-cited illustration from chaos theory involves the potential effect of a butterfly flapping its wings in the Amazon causing, through minute but cascading air disturbances a tornado in Kansas. A similar event for Army operators may have occurred early in December when NOAA promulgated the final regulations implementing two rounds of amendments to the Coastal Zone Management Act (CZMA). These regulations appear in the December 8, 2000, edition of the Federal Register, at pages 77124 through 77175.

The CZMA was enacted in 1972 to protect and, where possible, enhance and restore various resources within the coastal zone of the United States largely through encouraging and assisting coastal States to adopt and implement their own management plans. For purposes of the CZMA, the "coastal zone" is considered to be the coastal waters of the U.S. with the adjacent shorelands "strongly influenced by each other" and includes islands, transitional and intertidal areas, salt marshes, wetlands and beaches extending along both coasts and the Great Lakes.⁵⁵ In regard to federal agencies like the Department of the Army, the CZMA is essentially a planning statute and, like other planning statutes such as the National Environmental Policy Act and the National Historic Preservation Act, the CZMA imposes document-and-consult requirements upon federal agencies prior to undertaking actions that "directly affect" the resource in question.⁵⁶ Completion of this requirement is usually documented by the agency's receipt of a concurrence with the agency's consistency determination from the State agency involved.⁵⁷

However, while the relatively benign NEPA and NHPA do not impose substantive standards upon agency behavior, the CZMA requires Federal agencies conduct their actions in a manner "consistent to the maximum extent practicable" with the enforceable policies set forth in coastal zone management programs adopted by States and approved by NOAA. The NOAA regulations further articulate this standard to be one of mandatory compliance with those policies unless federal law prohibits such compliance.⁵⁸ The Act was intended to cause substantive change in Federal agency decision making within the context of the discretionary powers residing in such agencies. Accordingly, whenever legally permissible, Federal agencies shall consider the enforceable policies of management programs as requirements to be adhered to in addition to existing Federal agency statutory mandates. ... Federal agencies shall not use a general claim of a lack of funding or insufficient

⁵⁵ 16 U.S.C. § 1453(1).

⁵⁶ 16 U.S.C. § 1456(1).

⁵⁷ 15 CFR §§ 930.36, 930.41.

⁵⁸ 15 CFR § 930.32(a)(1).

appropriated funds for failure to include the cost of being fully consistent in Federal budget and planning processes as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program [in the absence of a] Presidential exemption...”⁵⁹

Although harsh, this proscription’s impact was historically mitigated for the Army as it applied only to actions that “directly affected” the coastal zone. The precise geographic reach of these provisions was a point of contention for years after the CZMA’s initial enactment. In 1984, the Supreme Court held that the Secretary of Interior’s sale of Outer Continental Shelf oil and gas leases was not an activity “directly affecting” the coastal zone and thus the Secretary was not required to obtain a consistency determination prior to approving such sales.⁶⁰ The court found that this language, adopted as a compromise during conference on the 1972 Act, was intended to apply the CZMA only to those federal activities that took place within the coastal zone itself.

In reaction to this decision, Congress replaced §307c(1)’s “directly affecting” language with “Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone....”⁶¹ As noted in the preamble to the final NOAA CZMA regulations, this amendment applies the federal consistency requirement to “any federal activity, regardless of location, [when that activity] affects any land or water use or natural resource of the coastal zone.”⁶² Moreover, the agency’s analysis must also include reasonably anticipated indirect and cumulative as well as direct effects. “[T]he term ‘affecting’ is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.”⁶³ “No federal agency activities are categorically exempt from this requirement.”⁶⁴ Examples of activities with effects on the coastal zone include a National Maritime Fisheries Service rule limiting the catch of a species of fish, a Corps of Engineers rule authorizing activity in navigable waters and wetland, and the establishment of “exclusionary zones” near military ranges and installations.⁶⁵

The nature of the federal action does not determine the applicability of the consistency requirement, but rather whether that action has reasonable foreseeable effects on coastal areas. “For example, a planning document or regulation prepared by a Federal agency would be subject to the federal consistency requirement if coastal effects from those activities [included within the document or regulation] are reasonably foreseeable.”⁶⁶ The new regulations and preamble do not further define “reasonably foreseeable” but leave that as a case-by-case determination.⁶⁷ The regulations cross-reference to the CEQ’s NEPA regulations in defining “indirect (cumulative and secondary) effects.”⁶⁸ Planners must thus consider potential symbiotic effects arising from agency and private activities.

⁵⁹ 15 CFR §§ 930.32(a)(2), 930.32(a)(3).

⁶⁰ . Secretary of Interior v. California, et alia, 464 U.S. 312 (1984).

⁶¹ Pub.L. 101-508, §6208(Nov.5, 1990).

⁶² 65 Fed.Reg. 77124 (Dec. 8, 2000).

⁶³ H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 968, 970-971

⁶⁴ Id. At 970

⁶⁵ 65 Fed.Reg. 77124, 77131 (Dec. 8, 2000).

⁶⁶ .” 65 Fed.Reg. 77124, 77130 (Dec. 8, 2000).

⁶⁷ Id.

⁶⁸ Id.

Given the breadth of these new requirements, Army planners are advised to take advantage of two programmatic aspects of the consistency requirement. First, 15 CFR 930.33(a)(3) allows Federal agencies to identify activities having a de minimis effect upon the coastal zone. If the State concurs with such identification, the agency need not again subject those activities to State review.⁶⁹ As the regulatory definition of de minimis, 15 CFR 930.33(a)(3)(ii), is couched in terms of “insignificant direct or indirect (cumulative and secondary) coastal effects”, planners may be able to look to NEPA environmental assessment/ FONSI standards for guidance in making such a determination and consistent with CZMA procedural requirements, use a NEPA EA “as a vehicle for ... consistency determination[s] or negative determination[s].”⁷⁰

Second, the NOAA regulations provide for Federal agency submission of general consistency determinations where the agency “will be performing repeated activity other than a development project (e.g., ongoing maintenance, waste disposal which cumulatively has an effect upon any coastal use or resource....”⁷¹ Although the agency is required to periodically consult with the State agency regarding the manner in which incremental activities are undertaken,⁷² this approach may have value as applied to frequently repeated training activities which may have more than a de minimis effect upon the coastal zone.

As always, consultation with installation or Regional ELSs is strongly encouraged. (MAJ Kohns/ USAR)

⁶⁹ 15 CFR § 930.33(a)(3)(i).

⁷⁰ 15 CFR § 930.37.

⁷¹ 15 CFR § 930.36c

⁷² id.,

Nineteenth Century Poet Brings Meaning to Army Environmental Law

LTC (P) Dave Howlett

The Library of America has just published *Longfellow, Poems and Other Writings*, a generous selection of the work of a great American poet. The book resonates with themes relevant to Army environmental lawyers.

Henry Wadsworth Longfellow is best known for poems such as “Paul Revere’s Ride,” “The Village Blacksmith,” and “The Children’s Hour.” He also wrote book length poems such as *Evangeline*, *Hiawatha*, and *The Courtship of Miles Standish*. Once considered one of our great poets, he no longer stands with Whitman, Hawthorne, and Melville. Rather, he is grouped with Lowell, Whittier, and Holmes. With publication of this book, however, his stock may rise again.

In 1863, the already-famous Longfellow published *Tales of a Wayside Inn*. Several travelers are stranded in an Inn and tell each other stories for entertainment. The Inn is in Sudbury, Massachusetts. Sudbury, of course, is the location of an Army installation that was disposed of (for the most part) during the last Base Closure round.⁷³

One of the tales, “The Birds of Killingworth,” is a cautionary environmental fable. In it, a town is filled with all types of birds, “the robin and bluebird piping loud,” and seagulls, with their “outlandish noise / of oaths and gibberish frightening girls and boys.” But many citizens want to get rid of the birds, especially crows. A town meeting is held:

They shook their heads, and doomed with dreadful words
To swift destruction the whole race of birds.

And so the dreadful massacre began;
O’er fields and orchards, and o’er woodland crests,
The ceaseless fusillade of terror ran.
Dead fell the birds, with blood stains on their breasts . . .

Disaster follows, of course. Unchecked insects “made the land a desert without leaf or shade.” Worms dropped from leafless trees “upon each woman’s bonnet, shawl, and gown.” “The wild wind went moaning everywhere, / lamenting the dead children of the air.”

Then they repealed the law, although they knew
It would not call the dead to life again;
As schoolboys, finding their mistake too late,
Draw a wet sponge across the accusing slate.

The tale ends with some remarkably successful reintroduction, stabilization, and critical habitat management.

Many of these poems will provoke thought and recognition with today’s readers. This poet and this book are well worth the reader’s time. (LTC(P) Howlett/ LIT)

⁷³ The book was originally advertised as *The Sudbury Tales* but Longfellow did not like the way that title sounded.